

**Statement of the Honorable Howard L. Berman Submitted in Regard to the
Senate Commerce Committee Hearing on Consolidation in the Radio Industry**

January 30, 2003

Chairman McCain, Ranking Member Hollings, and Distinguished Committee
Members:

I applaud your decision to hold this hearing on consolidation in the radio industry. I have been looking into this issue for the past year myself. I am deeply concerned that radio industry consolidation and related activities are hurting songwriters, musicians, recording artists, concert promoters, radio listeners, and the music community as a whole. I believe the negative effects of radio industry consolidation merit serious congressional scrutiny, and should spur investigations by the Department of Justice (DOJ) and Federal Communications Commission (FCC).

At the outset, I grant that consolidation of any industry is not a *per se* evil.

As is understood in antitrust law and jurisprudence, industry consolidation must be analyzed through a variety of prisms to determine if its effects are negative, neutral, or even positive. Thus, I want to be clear that my concerns about radio industry consolidation are not the product of some knee-jerk reaction, but rather arise from demonstrated problems created by that consolidation.

Almost exactly one year ago, I wrote the DOJ and FCC to relay allegations that “consolidation of the radio and concert promotion industries has had a variety of negative repercussions on recording artists, copyright owners, and consumers.” I relayed allegations that Clear Channel had ‘punished’ recording artists for their refusal to use its concert promotion service, Clear Channel Entertainment, by ‘burying’ radio ads for their concerts and by refusing to play their songs on its radio stations. I addressed concerns that radio industry consolidation had led to a resurgence of payola - where record companies must pay radio stations to play the music of their artists. I also relayed my concerns about reports of ‘parking’ or ‘warehousing’ of radio and television stations by Clear Channel. I encouraged the DOJ and FCC to fully investigate these allegations, and if they found violations of law, to prosecute.

The public reaction to my letter was utterly unexpected and totally overwhelming. Independent broadcasters, concert promoters, venue owners, radio deejays, musicians, bands' agents and managers, theatrical producers, actors' representatives, and recording industry executives inundated me with calls, emails, and letters. Virtually all decried the evils of consolidation in the radio and concert industries. Many focused on the conduct of Clear Channel in particular. The breadth of their allegations was astounding, and went far beyond the issues I addressed in my January 2002 letter to the DOJ and FCC.

Clear Channel representatives also contacted me, and I met with Lowrey and Mark Mays here in D.C. They denied all allegations of wrongdoing. Admitting to being hard-nosed businessmen, they explained the many complaints as the sour grapes of their failed competitors.

Based on this information, I continue to think there is enough substance to the allegations to warrant an full investigation. However, as Ranking Member of a Judiciary Subcommittee with only partial jurisdiction over the issues at hand, I am not in a position to determine the truth by ordering such an investigation. Besides, I thought it was the mission of the DOJ and FCC to investigate just such

allegations. Unfortunately, as I will discuss later, neither the DOJ or FCC have, to my knowledge, conducted investigations.

Thus, while many of these allegations are derived from first-hand accounts I have heard from a variety of sources, you will have to use your own judgement as to whether they warrant further investigation.

To wit, I heard allegations that:

- Clear Channel (CC) denies, or threatens to deny, radio airplay to recording artists if they use companies other than Clear Channel Entertainment (CCE) to promote their concerts, refuse to give local CC stations free concert tickets, or refuse to do interviews and free drop-by performances for CC stations;
- CC stations bury or refuse to carry ads for concerts or events not promoted by CCE;
- CCE refuses to let artists play venues it owns unless the artists agree to let

CCE be the nationwide tour promoter, or agree to use CCE venues in other markets;

- CCE uses predatory pricing to offer recording artists or events deals that independent concert and event promoters cannot offer;
- CCE signs exclusive deals with venues to ensure that competing concert promoters cannot access those venues to put on events;
- CCE threatens to boycott independent venues unless they allow CCE to be the exclusive promoter for certain types of events at the venue;
- CC radio stations refuses to run ads, play music, or engage in promotional activities associated with events at independent venues in markets in which CCE owns venues;
- CC “parks” or “warehouses” radio and television stations in certain markets in violation of legal ownership caps;
- CC has removed CC-owned programming, such as Rush Limbaugh and Dr.

Laura, from independent stations, and then given competing CC-owned stations exclusive rights to carry this programming, in a clear attempt to drive competing broadcasters out of business;

- CC demands a piece of theatrical productions before it will book such productions into the approximately 40 performing houses it owns in the top 50 U.S. markets for theater;
- Radio stations demand payment from record companies, usually through middlemen known as independent music promoters, in order to play the music of artists signed by those record companies;
- Radio stations engage in deceptive practices, such concert ticket giveaways which appear to be exclusive to a local radio station, but in fact involve callers to dozens of radio stations across the country; and
- Radio conglomerates operate some local stations “remotely” - meaning those stations do not have their own deejays and may not have any personnel on location.

While many of these allegations involve illegal activities, some involve merely unethical conduct, and others might just be termed examples of “bare-knuckles” business practices. Regardless of their legality, it is apparent that these alleged activities may negatively affect consumers, musicians, independent broadcasters and concert promoters, and others. We, as policymakers, must decide whether these effects are likely, and if so, whether we should do something to counteract them.

As you will hear from Jenny Toomey later, there is substantial evidence that radio industry consolidation has reduced music programming diversity. A recent report by the Future of Music Coalition (FMC), entitled Radio Deregulation: Has it Served Citizens and Musicians, concludes that “music radio is significantly homogenous. Formats with different names often play the same songs.”¹ For example, in August 2002, the top fifty (50) songs played by the Active Rock and Alternative formats shared 29 songs, or showed an overlap of 58%.² The FMC Report also documents that this music programming homogeneity has significantly

¹Radio Deregulation: Has it Served Citizens and Musicians, Future of Music Coalition Report (November 2002), pg. 59.

²Future of Music Coalition Report, pg. 56.

increased since the Telecommunications Act of 1996 started the stampede toward radio industry consolidation.

Music programming homogeneity has particular implications for musicians and songwriters. Musicians rely on radio airplay to drive both CD sales and concert attendance, which comprise their main sources of revenue. Similarly, songwriters depend on airplay of their musical compositions for performance royalties and to drive CD sales for which they receive mechanical royalties. To the extent that different radio stations share the same playlists, songwriters and musicians who are not on these narrower playlists thus suffer.

The allegations regarding rampant pay-for-play, or payola, also have a variety of troubling implications. Put aside the fact that undisclosed payola deceives radio listeners into believing that their favorite deejays are playing music they like, rather than the music that pays the best. At its core, payola constitutes blackmail of musicians, songwriters, and record companies. If they fail to pay, they may be denied access to a public resource essential to their survival. Payola has long had a disproportionate effect on those little-known or independent artists who lack the resources to either pay for play or to engage in major marketing

campaigns. But as the radio industry has consolidated, the payola rates have evidently risen to the point where even the big guys can't afford them. The proof is that the major record labels, independents, and several artists' groups recently put aside their intramural squabbling and jointly called on the FCC and Congress to address payola.

If true, many of the alleged activities outlined above would clearly harm the viability of independent concert and event promoters. While, once again, I grant that consolidation within an industry is not necessarily an evil, independent concert promoters should at least be given a level playing field on which to compete. If, through its control of the air waves and concert venues in certain markets, Clear Channel is forcing recording artists to sign with Clear Channel Entertainment in other markets, these tying arrangements could clearly have anticompetitive effects on independent concert promoters.

The consolidation of the concert promotion and radio industries may also may be responsible for the exorbitant rise in concert ticket prices after enactment of the Telecommunications Act of 1996. As my colleague Russell Feingold detailed in the findings of S. 2691, which he introduced last Congress, "from 1996

to 2001, the average concert ticket prices increased by more than 61 percent, while the Consumer Price Index increased by 13 percent.” This increase in ticket prices negatively affect both concert goers and musical acts themselves. Faced with rapidly growing ticket prices but relatively inelastic budgets, concert goers cannot afford to go to as many concerts. Each ticket they no longer buy is money out of some band’s pocket. While the most popular musical acts may benefit from higher ticket prices in the short term, these benefits will likely end once the predatory prices has driven independent concert promoters out of business.

There is a credible argument that radio station “parking” and “warehousing” negatively impacts both independent broadcasters and advertisers. A “parking” radio conglomerate has the ability to offer more attractive rates to advertisers than law-abiding competitors. Further, parking may give the conglomerate such a dominant market share that it can coerce advertisers into excessively advertising on its stations. The resultant diversion of advertising dollars clearly threatens the viability of competing stations. To the extent that competing stations go under, competition for advertising dollars goes down, and rates may go up.

The centralization of operations resulting from radio consolidation has its

own, peculiar set of negative implications. In a drive to cut costs and make their station purchases profitable, radio conglomerates have increasingly centralized operations, and in particular have cut the news and deejay staffs at local stations. Whereas in the past, the deejay was almost certainly down at the local station spinning records live, nowadays that deejay may very well be a recorded voice from another state, with “voice-tracked” snippets cut in to make it sound local. Further, cuts in local news staffs mean that local news coverage has decreased. The local news coverage that does happen is more and more likely to be pooled from among the stations owned by the conglomerate, or even syndicated from a competitor.

The absence of real, live personnel at your local station certainly bothers those who believe local programming is a key component to radio. Their concern stems from more than a nostalgia for the “good old days.” They raise serious questions about the ability of local stations to assist the public during emergencies, such as tornados, hurricanes, and terrorist attacks, if the station has no live deejay on the air, and no news team on the ground. Without a live personality on the air and a news team, there may be no one at the station to direct citizens to designated shelters, inform citizens of dangerous conditions (road closures, downed power

lines), or otherwise provide critical, up-to-the-minute information.

As you can see, the overwhelming response I received over the past year has only increased my concerns about the effects of horizontal and vertical integration in the radio and concert industries. But, while the public reaction to my letter was somewhat overwhelming, the reaction of the DOJ and FCC has been entirely underwhelming.

The reaction of the DOJ has been most disappointing. In a meeting with my staff, and a written response to me three months after I sent my letter, the DOJ encouraged me to forward any evidence of anticompetitive conduct in the concert promotion or radio industries. DOJ indicated it would initiate an investigation if it found such evidence credible.

As a result, I encouraged all the concert promoters, broadcasters, bands, and other members of the public who had contacted me with first hand evidence to, in turn, contact the DOJ. I gave them the name of the identified contact person at the DOJ, and assured that they would get a welcome reception. To those who expressed skepticism, I asserted the DOJ would do its job by vigorously

investigating allegations of antitrust violations and other illegal conduct.

It is now one year later, and as far as I can tell, the DOJ has done nothing. And I do mean nothing. According to many of the folks I told to contact the DOJ, the DOJ never responded to their overtures, or never followed up as promised after an initial call. My staff has attempted to follow up with DOJ several times, but their calls have not been returned either. I guess I shouldn't take it personally - others who contacted the DOJ on their own initiative told me they experienced similar unresponsiveness.

I do not know what to make of the situation. Considering the breadth of the allegations, there certainly appears to be enough to at least conduct a preliminary investigation.

Some may say, "I told you so." Since the day I sent my letter, they denigrated its likelihood of success, postulating that the Bush Administration would not allow the DOJ to actively pursue antitrust investigations. But this does not seem to be a sufficient explanation. The Bush DOJ has indicated, through its ongoing investigation of the Pressplay and MusicNet ventures, that it is interested

in publicly pursuing a lengthy investigation of speculative antitrust concerns that may be raised by new entities in the as-yet infinitesimally small market for legal online music. If it has such grave concerns about antitrust issues related to the music industry, why isn't it willing to pursue allegations of actual anticompetitive behavior in the related radio and concert promotion industries?

I don't know the answer to this question, and judging by the responsiveness of the DOJ on this issue to date, I do not expect to get a response even if I ask it. As a result, I am here today. It is increasingly obvious that this is an issue with which Congress itself must deal, if it is going to be dealt with at all. I again applaud you for looking into it, and will be most interested to hear what avenue for action you believe your investigation recommends.